In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 548

LEON NASH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. In 1966, following a nine-week jury trial in the United States District Court for the Southern District of New York, petitioner, tried together with six other defendants, was convicted on five counts of a multi-count indictment which charged him with conspiring to make and making fraudulent sales of unregistered common stock, in violation of 15 U.S.C. 77. On February 20, 1967, he was sentenced to concurrent terms of one year and one day's imprisonment on each count and fined a total of $500.

In submitting the case to the jury, the trial court declined to discharge the three alternate jurors. The regular jurors deliberated at length (three days) before returning their verdicts. None of the alternates were called upon to substitute for a regular juror and none participated in the deliberative sessions in the jury room. On direct appeal petitioner asserted that the retention of the alternates was contrary to Fed. R. Crim. P. 24(c), which requires the discharge of alternates when the case is submitted to the regular jurors. The court of appeals agreed but held that, in view of the record before it, the error appeared harmless. It noted, however, that a further proceeding by petitioner in the district court would not be inappropriate. *United States* v. *Hayutin*, 398 F. 2d 944, 950-951 (C.A. 2).[1] This Court denied a petition for a writ of certiorari 393 U.S. 961.

In February 1969, petitioner moved the district court to set aside the verdict "because of the opportunity of the alternate jurors to influence the regular jurors in their deliberations" (Pet. 5). The matter was referred to Judge Tyler, the trial judge, and in April 1969, a three-day evidentiary hearing was held. After hearing nine witnesses, Judge Tyler entered findings of fact, concluding that there "is not a scintilla of evidence that the defendant Leon Nash was prejudiced by anything which occurred or failed to occur during the deliberations of the jury" (Pet.

[1] Others convicted with petitioner had their appeals considered in *United States* v. *Billotti*, 380 F. 2d 649 (C.A. 2), certiorari denied, 389 U.S. 944.

App. A 24). He denied the motion as "totally devoid of merit" (Pet. App. A 25). The court of appeals affirmed, finding that the "record amply supports the District Court's findings." (Pet. App. A 28, 26-29).

2. We note at the outset that the situation here is unlikely to recur, since the court of appeals made quite clear its opinion on direct appeal that district courts must adhere strictly to the discharge requirements of Fed. R. Crim. P. 24(c). 398 F.2d at 950. The question is thus basically a factual one—whether, despite the fact that the alternates were not in the jury room during its deliberations, their opportunities to commingle with the regular jurors at other locations after the case was submitted to the jury "probably influenced" the verdict. Petitioner's principal evidence to support his claim was that of the jury foreman,[2] who testified that he saw the alternates commingle with the other jurors at their common hotel lobby and at one of the restaurants where the jurors ate, and heard them speak together (R. 10-11, 20).[3] The government relied on the testimony of four of the jurors, two of the alternate jurors, and one regular juror. Each of them, contradicting the foreman's testimony, agreed that there had been no communication between the regular and alternate jurors dur-

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[2] The foreman had sought to aid counsel for other defendants in their efforts to impeach the verdicts in 1966 (R. 52). A co-defendant, Harris, also testified for petitioner as to what fraternization between the jurors he thought he saw (R. 5-8). Petitioner's counsel stated he was not "overly impressed" by Harris' testimony (R. 112).

[3] "R." refers to the one volume transcript of the evidentiary hearing on file with the Clerk of this Court.

ing the period of deliberations—that, at most, individuals may have exchanged a smile or nod of greeting as the two groups, on occasion, converged (R. 32-50, 59-68, 99, 103, 117-119, 127-134, 151-164). Any discrepancies between the testimony of the marshals and their prior affidavits, so heavily relied upon by petitioner (Pet. 8-10, 20-21), were for the trier of fact to resolve; there was no abuse of discretion in resolving them against petitioner.

The evidence Judge Tyler credited showed that once deliberations began, the alternates always remained apart from the regular jurors in court except when the two groups were recalled to have testimony re-read or to receive further instructions (R. 59-60); at such times, a panel separated the alternates from the regulars and they had no opportunity to speak (R. 69). Petitioner describes one alternate juror, Mrs. Marx, as hostile (Pet. 10-11, 18; see 21). Yet the foreman did not say he saw or heard Mrs. Marx speak to the regular jurors during deliberations. Moreover, in her testimony at the hearing, Mrs. Marx denied any feeling of hostility or that she communicated with a regular juror during the days of jury deliberation (R. 66-68). Miss Riordan, a regular juror, corroborated Mrs. Marx, stating that she had never heard Mrs. Marx express any views of the case before the deliberations were held (R. 151, 153), and certainly not during the deliberations (R. 153). Miss Riordan testified that the two groups had always been separated and that when they did meet they were "too far away to speak" (R. 155, 162, 164-166; see also 29, 46, 49, 59, 62, 91, 102,

121, 125). In short, as the court of appeals held, the district court could properly conclude that the record was "barren of any prejudicial contact" (Pet. App. A. 28-29).[4]

3. Petitioner's other contentions relate to highly particular aspects of the hearing; as to them, we rely on the thorough opinion of the court below.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1969.

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[4] *United States* v. *Virginia Erection Corp.*, 335 F. 2d 868 (C.A. 4), upon which petitioner relies, is inapposite. In that case, wholly unlike the situation here, the alternate juror spent the entire period of deliberations in the jury room with the regular jurors.

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CERTIORARI DENIED